ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
WENDELL L. GRIFFEN, JUDGE

DIVISION II

CA 05-947

December 6, 2006

RICKEY JOE WILLIAMS, APPELLANT	AN APPEAL FROM GARLAND COUNTY CIRCUIT COURT [NO. JV 2004-186]
V.	HON. VICKI S. COOK, JUDGE
ARKANSAS DEPARTMENT OF HUMAN SERVICES, APPELLEE	AFFIRMED; MOTION TO RELIEVE COUNSEL GRANTED

This is a no-merit appeal from an order terminating the parental rights of appellant Rickey Williams with regard to his two sons, RVR, d.o.b. 08/22/98, and RLR, d.o.b. 4/30/00.[1] Williams's counsel filed a request to be relieved, asserting that there is no meritorious basis for an appeal from the termination of Williams's parental rights. We previously remanded because counsel failed to address two adverse rulings, which he now addresses on resubmission.[2] In addition, Williams has submitted *pro se* points of appeal but appellee Arkansas Department of Human Services (ADHS) submitted no brief in response.

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[1]The children are so designated because their actual initials are identical.

[2]*See Williams v. Arkansas Dep't of Human Servs.*, CA 05-947, (May 3, 2006) (not designated for publication).

Because neither the adverse rulings nor Williams's arguments offer a meritorious basis for an appeal, we grant counsel's request to be relieved and affirm the termination order.

I. Background Facts

ADHS first took emergency custody of Williams's sons on March 14, 2003, when they were removed from the custody of their mother.[3] The children were subsequently determined to be dependent-neglected and were placed into foster care with their aunt. Custody was thereafter returned to their mother on September 23, 2003.

However, the mother then left the children in Williams's care for approximately nine weeks in early 2004. A family-in-need-of-services petition was filed on RVR due his excessive absences from school and excessive tardiness. RVR was described as being "behind academically," but his attendance improved while he was in his father's care. Even though Williams tested positive for marijuana usage at the April 13, 2004 hearing, the court allowed him to retain custody of his sons at that time. However, the boys were again placed in ADHS's custody on April 26, 2004, and were again determined to be dependent-neglected. Williams was allowed personal visitation and telephone visitation. The goal of the case plan was reunification. Williams was ordered to comply with the case plan; to obtain stable employment; to complete parenting classes; to regularly attend Narcotics Anonymous (NA) meetings; to obtain an NA sponsor; and to remain drug-free. He completed parenting classes

[3]The mother's parental rights were also terminated but that determination is not the subject of this appeal.

and attended eighty NA meetings but never obtained a sponsor.

Williams was incarcerated in July 2004 for possession with intent to deliver a controlled substance, and by his own admission, had an outstanding arrest warrant in Alabama on a similar charge at the time of the termination hearing. He remained incarcerated during the pendency of the proceedings in this case and testified at the termination hearing that he would be released in approximately eleven months.

Review hearings were conducted on August 25, 2004, and November 17, 2004; the permanency-planning hearing was held on January 26, 2005, during which the trial court changed the goal of the case to termination. ADHS filed a petition to terminate Williams's parental rights on February 7, 2005. The termination hearing was held on March 9, 2005. After hearing the testimony of Williams, various ADHS employees, the boys' counselors, the foster mother, and the CASA volunteer, the trial court determined that Williams's parental rights should be terminated.

II. Standard of Review

Counsel may petition to be relieved on appeal in a termination of parental rights case, if, after a conscientious review of the record, he finds no issue of arguable merit for appeal. *Linker-Flores v. Arkansas Dep't of Human Servs.*, 359 Ark. 131, 194 S.W.3d 739 (2004) (*Linker-Flores I*). Counsel's petition must be accompanied by a brief discussing any arguably meritorious issue for appeal. *Id*. In evaluating a no-merit brief, the issue for the court is whether the appeal is wholly frivolous or whether there are any issues of arguable merit for

appeal. *Id*.

Pursuant to Ark. Code Ann. § 9-27-341 (Supp. 2005), a circuit court may terminate parental rights if the court finds that there is an "appropriate permanency placement plan for the juvenile" under § 9-27-341(b)(1)(A) and finds by clear and convincing evidence:

> [(b)(3)](A) That it is in the best interest of the juvenile, including consideration of the following factors:
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> (i) The likelihood that the juvenile will be adopted if the termination petition is granted; and
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> (ii) The potential harm, specifically addressing the effect on the health, and safety of the child, caused by continuing contact with the parent, parents, or putative parent or parents; and
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> (B) Of one (1) or more of the following grounds:
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> (i)(a) That a juvenile has been adjudicated by the court to be dependent-neglected and has continued out of the home for twelve (12) months and, despite a meaningful effort by the department to rehabilitate the home and correct the conditions which caused removal, those conditions have not been remedied by the parent.
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> (ii)(a) The juvenile has lived outside the home of the parent for a period of twelve (12) months, and the parent has willfully failed to provide significant material support in accordance with the parent's means or to maintain meaningful contact with the juvenile.
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> ...
>
> (vii)(a) That other factors or issues arose subsequent to the filing of the original petition for dependency-neglect that demonstrate that return of the juvenile to the custody of the parent is contrary to the juvenile's health, safety, or welfare and that, despite the offer of appropriate family services, the parent has manifested the incapacity or indifference to remedy the subsequent issues or factors or rehabilitate the parent's circumstances that prevent return of the juvenile to the custody of the parent.

See also Camarillo-Cox v. Arkansas Dep't of Human Servs., 360 Ark. 340, __S.W.3d ___

(Jan. 20, 2005).

Clear and convincing evidence is that degree of proof that will produce in the fact-finder a firm conviction as to the allegation sought to be established. *Id*. When the burden of proving a disputed fact is by clear and convincing evidence, the inquiry on appeal is whether the trial court's finding that the disputed fact was proven by clear and convincing evidence is clearly erroneous. *Linker-Flores I*, *supra*. A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been made. *Camarillo-Cox*, *supra*. In resolving the clearly erroneous question, we give due regard to the opportunity of the trial court to judge the credibility of witnesses. *Camarillo-Cox*, *supra*. We review such cases *de novo* on appeal. *Wade v. Arkansas Dep't of Human Servs*., 337 Ark. 353, 990 S.W.2d 509 (1999).

III. The Trial Court's Decision

The trial court specifically found that it would be contrary to the children's best interests to return them to Williams's care and that the children's return to Williams's home could not be accomplished in a reasonable period of time as viewed from the children's perspective. The court further found that the children had been in ADHS's custody from March 14, 2003 until May 12, 2003, and since April 26, 2004; that Williams failed to follow the case plan; failed to cooperate with ADHS; failed to obtain stable housing and employment; failed to pay child support as ordered; and wilfully failed to provide significant

material support in accordance with his means. In addition, the court noted that visitation with ADHS was suspended as of November 17, 2004, due to a counselor's recommendation, and that Williams faced pending criminal charges.

The court also determined that, despite the offer of reasonable services by ADHS, Williams failed to remedy the conditions that caused removal and that other factors arose subsequent to the filing of the original petition for which Williams has manifested the incapacity or indifference to remedy. Finally, the court determined that it was not in the children's best interests to wait any longer for Williams to comply with the court's orders because the "children require certainty and security and in that the uncertainty caused by the parental failure to comply with this Court's orders negatively influences these children."

IV. Adverse Rulings Regarding the Adoptability of the Children

Because Williams's counsel seeks to withdraw, his brief must include an argument section that lists all rulings adverse to his client that were made on any objection, motion, or request made by any party and provides an explanation as to why each ruling is not a meritorious ground for reversal. *Causer v. Arkansas Dep't of Human Servs.*, 93 Ark. App. 483, __ S.W.3d ___ (Dec. 14, 2005). There were three adverse rulings in this case: two relating to objections raised during the testimony of Gail Hovell, ADHS's adoption specialist, concerning the children's adoptability, and the finding that Williams's parental rights should be terminated. We affirm the termination order and grant counsel's request to be relieved because none of these adverse rulings offer a meritorious basis for an appeal.

Hovell testified on direct examination that both RVR and RLR should be "adopted easily" and were "very adoptable" because they were young, bright, and healthy, except for their emotional problems. She also testified, in essence, that their adoptability diminishes as they get older.

On cross-examination, Hovell was asked, "Isn't is true that 99.99% percent of the time [when] you are asked that question [are the children adoptable], that is your answer?" ADHS objected on relevancy grounds and the court responded, "What is the relevance? She's credible. We find no reason to find her uncredible [sic]," and subsequently indicated that the question was "not relevant."

Next, Williams's counsel asked Hovell how many children were awaiting adoption whom she had testified were adoptable and whose parents' rights had been terminated. ADHS's counsel again objected on relevance grounds. The court did not rule that the question was irrelevant but stated its belief that Hovell could not answer the question. It also stated that Garland County had "one of the best records of any county in the state for adopting children. And that's a fact."

Williams's counsel then asked Hovell, "Do you know how many kids that you have now waiting adoptions that rights have been terminated?" ADHS again objected on relevancy grounds; the trial court stated, "She may not even know" but subsequently determined, "She can say, 'I don't know.'" Hovell then testified that she did not know exactly because some of the children were in the process of being adopted while others were

in the six-month placement waiting period. She then estimated that six out of thirty children were in such "pre-adoptive" homes.

An appeal from the trial court's relevancy rulings in this case would be wholly frivolous. Relevant evidence is evidence that has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Ark. R. Evid. 401. The likelihood that a juvenile is adoptable is a factor that the trial court is to consider under § 9-27-341(b)(3)(A)(i) before terminating a parent's rights. Because not every child is adoptable, the credibility of an adoption specialist and the number of children whom she has been found to be adoptable who are still awaiting adoptions may be relevant issues.

However, as counsel argues, Williams's offered no factual basis for asserting that Hovell opined that children were adoptable 99.99% of the time. Nor did he not attempt to counter the *basis* for Hovell's conclusion that the children *in this case* were adoptable because they are young, bright, and healthy. Further, after Hovell gave these specific reasons why Williams's sons are highly adoptable, the court found that she was a credible witness – in other words, that she had a credible basis for her conclusion that the children here were adoptable.

Hovell subsequently testified that, due to the children's emotional problems, it would be best for them to complete therapeutic treatment before being placed for adoption. However, she also testified that in similar cases, children who have required such treatment

before being adopted had done well. Notably, Williams did not assert that the children's need for counseling prevented them from being adoptable.

Finally, Williams ultimately received an answer to his question concerning how many children whose parents' rights had been terminated were awaiting adoption. Of the thirty children that the court indicated were awaiting adoption, Hovell estimated there were six children in pre-adoptive homes. Williams did not attempt to establish why the other children had not been adopted or to establish that their circumstances were similar to the children's circumstances in the instant case.

In short, given Hovell's testimony as a whole, it is clear that, regardless of how she testifies in *other* adoption cases, she provided sufficient testimony in the *instant* case on which the trial court could properly determine that RVR and RLR are adoptable – which was the real relevancy issue for the trial court. Even if Hovell's testimony was somehow suspect, her conclusions were corroborated by that of Catheryn Luna, ADHS's coordinator of its therapeutic foster-care program, who testified that the children were adjusting well in foster care and that they would not be hard to place but needed to continue their therapeutic treatment. Accordingly, an appeal from the adverse relevancy rulings would be wholly without merit.

V. Termination

The final adverse ruling was that Williams's parental rights should be terminated. After remand, Williams filed *pro se* points for reversal, none of which offer a meritorious

basis for an appeal. He informed this court that he has a "possible" release date of December 2006. He also presents documentary evidence that, since the termination hearing, and while incarcerated, he has completed a one-day anger management program, a two-day anger resolution seminar, a one-day substance-abuse treatment program, and that he has passed six random drug tests since January 7, 2005.

Williams admits that he "shirked" his responsibility toward his sons "by becoming involved in drugs, which resulted in my present conviction." However, he maintains that he and his sons were close and that they "excelled in school and socially" while they were in his custody. He maintains that he has "a plan in place prior to my release from prison and I fully understand the responsibility of raising two sons until they are fully grown." Williams insists that he complied with the case plan in 2004 which required him to prove a stable home for his sons and to take periodic drug tests. He asks that he be allowed to submit his plan regarding employment, food, clothing, and housing for his sons, and requests that he be granted full custody of his sons upon his release from prison.

Despite Williams's arguments, an appeal from the termination finding would be wholly without merit. As an initial matter, we cannot consider any evidence that was not before the trial court at the March 9, 2005 hearing, as the trial court was obligated to make its findings based on the evidence before it at that time. Therefore, most of the evidence and arguments presented by Williams are not ripe for consideration.

In sum, the evidence that was before the trial court at the time of the termination

hearing demonstrates that the trial court's decision to terminate Williams's parental rights was supported by clear and convincing evidence. First, the trial court properly determined that the boys had been out of the home for at least twelve months. The children had been in ADHS's custody from March 14, 2003 until May 12, 2003, and from April 26, 2004, until March 9, 2005, the day of the termination hearing. Clearly, given these time periods, the children were out of Williams's care for more than the minimum requisite twelve-month period. *See* Ark. Code Ann. § 9-27-341(b)(3)(B)(ii)(d)(stating it is not necessary that the twelve-month period immediately precede the filing of the petition requesting termination).

Second, the trial court properly found that Williams had failed to remedy the conditions that caused the children's removal and manifested the incapacity or indifference to remedy the circumstances that arose after children were removed. Naturally, Williams was unable to comply with most of the case plan after he was incarcerated in July 2004. However, while incarceration is not, of itself, conclusive on the termination issue, imprisonment does not toll a parent's responsibilities toward his children. *Linker-Flores v. Arkansas Dep't of Hum. Servs.* 364 Ark. 224, __S.W.3d. ___ (Nov. 16, 2005) (*Linker-Flores II*). Moreover, Williams failed to comply with the court's orders *prior to* his incarceration. Although he completed parenting classes and attended numerous NA meetings, he never obtained an NA sponsor. He also failed to obtain housing before he was incarcerated; he admitted that he was living with friends. Further, he failed to pay child support and tested positive for marijuana usage at the first hearing.

Third, the trial court correctly concluded that it was not in the children's best interests to return them to Williams's care. RVR was six years old at the time of the termination hearing; RLR was four. Various witnesses testified that the primary need of the boys was a stable, loving home. The boys were receiving counseling for certain behavior problems, which were uniformly attributed to the lack of stability they had experienced. Every witness who opined on the issue, except for Williams, recommended termination of Williams's parental rights, primarily citing the boys' need for stability and structure. In addition, at the recommendation of one counselor, visitations with Williams ceased in November 2004 because the counselor found that there was no value in continuing the visitations for the boys, and the court agreed, citing the need to avoid further "chaos" for the boys.

Fourth, there was ample evidence to support that the children were adoptable. ADHS's adoption specialist testified that the boys were bright and healthy and were "very adoptable" even with their emotional problems. There was also testimony that the boys' prognosis was good, that they would "stabilize" with adoption, and that it would not be difficult to place them in an adoptive home.

In short, the trial court's decision to terminate Williams's parental rights was not clearly erroneous where Williams had little contact with his sons in their early lives; where they had no contact with him for approximately four months prior to the termination hearing; where they are adoptable and are adjusting in foster care; where Williams's incarceration during the pendency of these proceeds amply demonstrates that maintaining a stable home

for his sons is not his primary consideration; and where the lack of a stable home was cited as the primary reason the boys were experiencing emotional problems.

Nor was there evidence Williams would be able to provide a stable home within a reasonable time, from his sons' perspective, even if he was released from prison within eleven months after the termination hearing because he still faced a criminal drug charge in the state of Alabama as of the date of the termination hearing. Simply put, to continue the children in foster care for another eleven months on the mere expectation that their father would face no further jail time upon completion of his sentence in Arkansas would unnecessarily subject the boys to even further uncertainty.

On these facts, the termination decision in this case offers no meritorious basis for an appeal. Accordingly, we affirm the trial court's order terminating Williams's parental rights and grant counsel's request to be relieved.

PITTMAN, C.J. and GLOVER, J., agree.